IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JACOB M. CLARY, Appellant.	No. 37180-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Jacob Clary guilty of felony driving under the influence (DUI) in violation of RCW 46.61.522(1)(b) and .502(6)(b). Clary appeals, arguing that he was denied his constitutional right to effective assistance of counsel when his attorney did not object to a limiting instruction that improperly allowed the jury to use his stipulation to a prior conviction as evidence that he had a propensity to commit alcohol-related driving offenses. Clary stipulated that he "was previously convicted on October 19, 2000 of a predicate offense pursuant to RCW 46.61.522(1)(b) as defined in RCW 46.61.502(6)(b)." Clerk's Papers (CP) at 35. Although the trial court's limiting instruction could have eliminated any possible confusion by explicitly stating the number of the element to which his stipulation applied, it is clear from the record that this stipulation was understood by all parties and the jury to relate only to the predicate offense element of the charge, number 4 of jury instruction number 9, and that the jury

was not misled. Because Clary was not prejudiced by the limiting instruction, we affirm.

FACTS

On the evening of September 20, 2007, Washington State Patrol Trooper Mitchell Bauer stopped a car driven by Clary on State Route 101 in Mason County. Clary, who was driving 58 mph in a 45 mph zone, explained that he was building speed for the 60 mph zone immediately ahead. Bauer smelled alcohol coming from inside the car and noticed an 18-pack of Keystone beer on the floorboard behind the driver's seat and an open pack of Keystone behind the passenger seat. When asked, Clary initially stated that he had drunk two beers, but he later admitted to drinking four beers, one larger than the others. Clary's eyes were red and watery.

Trooper Bauer asked Clary to step from the car and perform field sobriety tests. The test results were mixed. Clary had no difficulty reciting his ABCs but did exhibit some tracking and horizontal nystagmus, an involuntary jerking of the eyes. Although Clary indicated that he understood Bauer's instructions, he had difficulty staying in position while the instructions were given, distinguishing his left and right foot, and staying on or turning on an imaginary line. He also failed to successfully perform the one-leg stand. Based on Clary's test performance, Bauer concluded that Clary was impaired and arrested him for driving under the influence. Clary refused to submit to a breath test.

Following an investigation, the Mason County Prosecutor charged Clary with felony DUI in violation of RCW 46.61.522(1)(b) and .502(6)(b), alleging that Clary refused to take a breath test contrary to former RCW 46.61.5055 (2007) (count I), and first degree driving while license suspended in violation of RCW 46.20.342(1)(a) (count II). Clary pleaded guilty to count II and proceeded to trial on count I only, the felony DUI charge.

By pleading guilty, Clary limited the evidence the jury would hear regarding his unlawful driving that night. In addition, Clary kept the jury from learning that he had a prior vehicular assault conviction by entering the following stipulation:

> The parties herein stipulate that, for purposes of the crime of Felony Driving Under the Influence as charged herein in Count I, the defendant, JACOB M. CLARY, was previously convicted on October 19, 2000 of a predicate offense pursuant to [former] RCW 46.61.522(1)(b) as defined in RCW 46.61.502(6)(b).

CP at 35.

The trial court instructed the jury on the elements of driving under the influence as follows:

> INSTRUCTION NO. 9
>
> To convict [Clary] of driving while under the influence as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1. That on or about September 20, 2007 [Clary] drove a motor vehicle;
> 2. That [Clary] at the time of driving a motor vehicle was under the influence of or affected by intoxicating liquor;
> 3. That the acts occurred in Mason County, Washington; and
> 4. That [Clary] was previously convicted of a predicate offense pursuant to RCW 46.61.522(1)(b) as defined in RCW 46.61.502 (6)(b).
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 33. It also gave the following instruction limiting the jury's consideration of Clary's stipulation:

> INSTRUCTION NO. 5
>
> Evidence that [Clary] has previously been convicted of a crime has been introduced in this case. Such evidence is not evidence of [Clary's] guilt, except insofar as it may apply to an element of the crime charged in Count I. Such evidence may not be considered by you for any other purpose not listed in this instruction.

CP at 29. Clary's trial counsel did not object to the trial court's instructions.

In closing, the State argued:

> There are four elements, technically, and that is - I think it was Instruction No. 9, which we always call the to convict instruction because it starts out to convict. There are four numbered elements.
>
> . . . .
>
> Number four, that [Clary] was previously convicted of a predicate offense pursuant to RCW, and then it goes on to list the RCW numbers. I won't bore you with that right now. What I want to say to you about that is that's the last thing that happened in the State's case. I presented the stipulation the parties entered into. The Judge instructed that it's the same as testimony, it's the same as evidence before you. The parties, including [Clary], have stipulated that element number four has been proved, that he has a prior conviction that satisfies that element.
>
> That only leaves element number two. So in a way in this particular trial, that streamlines the job that you have to do, which is to determine number two, that at the time of driving on September the 20th, 2007, [Clary] was under the influence of or affected by intoxicating liquor.

Report of Proceedings (RP) at 103-104.

For its part, the defense contested whether evidence of the sobriety test results and driving at an increased speed while approaching a faster speed limit zone was sufficient to prove beyond a reasonable doubt that Clary was driving under the influence of intoxicants. For example, Clary's defense counsel argued:

> And the most important part about these standardized field sobriety tests is that they don't prove beyond a reasonable doubt anything. By the State's own admission, the walk-and-turn test is sixty-eight percent reliable. The one-leg test is sixty-five percent reliable, and the nystagmus test is seventy-seven percent reliable.
>
> What does that mean to you? That means that if you give a hundred people this test, the walk-and-turn test, thirty-two of those hundred people would be wrongly, wrongly, improperly adjudicated to be impaired or under the effect of alcohol, thirty-two out of a hundred.

RP at 113.

The jury found Clary guilty of felony driving under the influence, and the trial court

sentenced him to a 60-month standard range sentence followed by community custody and provided that as to "Count I: The total confinement plus community custody shall not exceed 60 months." CP at 9.

ANALYSIS

On appeal, Clary only argues that he is entitled to a new trial because he "was denied his right to effective representation when his attorney failed to object to an instruction designed to limit the prejudicial impact of evidence he had a prior conviction, but which actually exacerbated the unfair prejudice." Br. of Appellant at 1. Clary specifically argues that instruction number 5 "told jurors they were free to use proof of the prior conviction to establish any element of the offense." Br. of Appellant at 9. We disagree.

A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. Trial strategy and tactics cannot form the basis of a finding of deficient performance. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *Hendrickson*, 129 Wn.2d at 77-78). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland*, 127

Wn.2d at 335.

The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992); *State v. Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007).

Here, the defense strategy was designed to minimize the jury's knowledge of Clary's long history of unlawful driving. By pleading guilty to driving while license suspended and stipulating that he had an unnamed but qualifying conviction for a predicate offense, the defense succeeded in keeping Clary's criminal driving history from the jury. Moreover, our review of the record establishes that the trial court, the State, and the defense all made it clear that the only issue for the jury to decide was whether the evidence of Clary's speeding and failed sobriety tests was sufficient to prove beyond a reasonable doubt that he was driving under the influence. Clary's attorney's performance was not deficient for having employed the strategy of having Clary plead guilty to driving while license suspended and stipulating to a prior conviction for an unnamed but qualifying predicate offense.

Moreover, given the State and the defense closing arguments, the instructions were readily understood and not misleading to the ordinary mind. *State v. Foster*, 91 Wn.2d 466, 480, 589 P.2d 789 (1979). Here, the jury was not misled into believing that Clary's stipulation relieved it of the burden of finding beyond a reasonable doubt that he was driving under the influence. Because the jury clearly understood the element to which Clary stipulated, the trial court's limiting instruction did not prejudice Clary merely by failing to specify the number of the element to which the stipulation related. *See, e.g.*, *State v. Holt*, 56 Wn. App. 99, 783 P.2d 87 (1989) (an

instruction which could have been read to direct the jury to find an element was harmless in light of the instructions and arguments as a whole), *review denied*, 114 Wn.2d 1022 (1990). Clary's trial counsel was not ineffective for failing to object to the trial court's limiting instruction and we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

PENOYAR, A.C.J.